Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

PUPI WHITE, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 8, 1994

QUESTION PRESENTED

1. Given that the Courts of Appeals for the Eleventh and Ninth Circuits have held that a timely filed motion to reopen or reconsider a final order of deportation of the Board of Immigration Appeals renders the order nonfinal for purposes of judicial review until the motion to reopen or reconsidered is denied, and that the Courts of Appeals for the Fifth and District of Columbia Circuits have held a timely motion to reopen or reconsider, if filed in good faith, renders the final order nonfinal for purposes of judicial review, did the Eighth Circuit err in concluding, as have the Courts of Appeals for the Third and Seventh Circuits, that a timely filed motion to reopen or reconsider does not render the order nonfinal for purposes of judicial review.

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Nocon v. I.N.S., 789 F.2d 1028 (3rd Cir. 1986)

Pierre v. I.N.S., 932 F.2d 418 (5th Cir. 1991)

Yamada v. I.N.S., 384 F.2d 214 (9th Cir. 1967)

STATUTES

5 U.S.C. § 704, Section 704 of the Administrative Procedure Act, as amended

8 U.S.C. § 1105a (a) (1), Section 106 (a) (1) of the Immigration and Nationality Act, as amended

8 U.S.C. § 1105a (a) (6), Section 106 (a) (6) of the Immigration and Nationality Act, as amended

28 U.S.C. § 1254 (1)

LEGISLATIVE HISTORY

H.R. No. 1086, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2950, 2967

H.R. Rep. No. 101-955, 101st Cong., 2d Sess. (1990), reprinted in 101 U.S. Code Cong. & Admin. News 6798

REGULATIONS

8 C.F.R. § 3.2

8 C.F.R. § 3.8

8 C.F.R. § 103.5 (a) (1) (iv)

RULES

Fed.R.App.P. 40 (a)

Supreme Court Rule 13.1

Supreme Court Rule 13.4

OPINIONS OF COURT AND ADMINISTRATIVE AGENCY

1. March 19, 1985, oral decision of Immigration Judge O. John Brahos.

2. June 2, 1992, decision of the Board of Immigration Appeals.

3. October 8, 1993, decision of the Eighth Circuit Court of Appeals.

4. December 9, 1993, decision of the Eighth Circuit Court of Appeals denying Rehearing by Panel.

STATEMENT OF THE SUPREME COURT'S JURISDICTION

On October 8, 1993, the Court of Appeals for the Eighth Circuit dismissed as untimely the petitioner's Petition for Review from the June 2, 1992, final order of deportation issued by the Board of Immigration Appeals ("BIA").

Pursuant to Fed.R.App.P. 40 (a), petitioner sought Rehearing by Panel of the October 8, 1993, decision. Under the Rule petitioner initially had until October 22, 1993, to file his Petition for Rehearing. On motion of the petitioner the Eighth Circuit extended the time within which to file the Petition for Rehearing to November 4, 1993. On second motion of the petitioner the Eighth Circuit extended the time within which to file the Petition for Rehearing to November 5, 1993. The Petition for Rehearing was timely received by the Eighth Circuit on November 5, 1993.

The Petition for Rehearing by Panel was denied by the Eighth Circuit on December 9, 1993.

Pursuant to 8 U.S.C. § 1254 (1) (West 1993), the petitioner seeks a writ of certiorari from this Court to review the Eighth Circuit's decision dismissing his Petition for Review as untimely.

Pursuant to Supreme Court Rules 13.1 and 13.4 the petition for writ of certiorari in the instant case is deemed timely when it is filed with the Clerk within 90 days after the date the Petition for Rehearing was denied. Thus, the petitioner has until March 9, 1994, within which to file the instant petition.

STATEMENT OF THE CASE

On March 19, 1985, an immigration judge ordered the petitioner deported and refused his request for voluntary departure. The petitioner timely appealed both the order of deportation and denial of voluntary departure to the Board of Immigration Appeals ("BIA"). On June 3, 1992, the BIA dismissed the petitioner's appeal and issued a final order of deportation. On July 6, 1992, the petitioner timely moved the BIA to reopen and reconsider its decision (as of this date the BIA has yet to rule on the motion). On September 2, 1992, 91 days after the BIA's order, the petitioner's Petition for Review of the final order of deportation, filed pursuant to Section 106 (a) (1), was received by the Eighth Circuit Court of Appeals.

In its decision of October 8, 1993, the Eighth Circuit ruled that it had jurisdiction to consider a timely filed petition for

review of a final order of deportation, regardless of any pending motion to reopen or reconsider. (Decision at 11). The Court then dismissed the instant petition for review for lack of jurisdiction because, in the Court's opinion, it was filed one day beyond the 90 day period set forth in Section 106 (a) (1) of the INA. The record will reflect the petitioner's strong opposition (and his reasoning) to the dismissal based on the concept of constructive filing.

Pursuant to Fed.R.App.P. 40 (a), the petitioner filed a Petition for Rehearing by Panel urging the Eighth Circuit to rehear its October 8, 1993, decision insofar as the court held the filing of a motion to reopen or reconsider within the time period set forth for judicial review does not toll the period for seeking judicial review of the original order of deportation until after the motion is denied.

On December 9, 1993, the Eighth Circuit denied petitioner's Petition for Rehearing. Pursuant to 28 U.S.C. § 1254 (1) (West 1993) and Supreme Court Rules 13.1 and 13.4, the petitioner seeks a writ of certiorari from the Court to review the decision of the Eighth Circuit and to provide guidance on a three-way split in the Circuit Courts of Appeals on whether a timely filed motion to reopen or reconsider a final order of deportation renders the order nonfinal for purposes of seeking judicial review until the motion is denied.

ARGUMENT

1. The Eighth Circuit's Decision is in Conflict with Other Circuit Court Decisions on the Issue

Section 106 (a) (1) of the INA provides "a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order . . ."

In addition to judicial review, the INA regulations permit an affected alien to move the BIA to administratively reopen or reconsider the final deportation order. 8 C.F.R. § 3.2 (West 1992).

Because the INA authorizes an alien to file both a motion to reopen or reconsider and a petition for judicial review, an issue has arisen as to whether a motion to reopen or reconsider renders the final order of deportation nonfinal for purposes of judicial review until the motion is denied.

The seven Circuit Courts addressing this issue have split fairly evenly into three

distinct groups.

The Eleventh Circuit and Ninth Circuits expressly hold that a timely filed motion to reopen or reconsider renders an otherwise final order of deportation nonfinal for purposes of judicial review. In Fleary v. United States, 950 F.2d 711, 713 (11th Cir. 1992), the court noted

> that if no petition to reopen a deportation order of the BIA is filed, the petitioner must file a petition for review within 90 days of the order of deportation. If a timely motion to reopen or reconsider is filed with the BIA, a petition for review the underlying deportation order must be filed within 90 days of the Board's decision on the motion to reopen or reconsider. The motions will then be consolidated for review pursuant to 8 U.S.C. § 1105a (a) (6).

Similarly, in Fayazi-Azad v. I.N.S., 792 F.2d 873, 874 (9th Cir. 1986), the court held "where a petitioner elects to file a motion to reopen before seeking judicial review, the otherwise appealable final order becomes no

longer appealable in this court until motion is denied or the proceedings have been effectively terminated." citing Hyun Joon Chung v. I.N.S., 720 F.2d 1471, 1474 (9th Cir. 1983), cert. denied 467 U.S. 1216 (1984). See also Bregman v. I.N.S., 351 F.2d 401, 402-03 (9th Cir. 1965) (holding when an appeal is taken within the six months after a timely motion to reopen has been denied by the BIA the court of appeals has jurisdiction to review both the denial of the motion to reopen and the original order of deportation). Thus, the Ninth Circuit follows Fleary to the extent the motion to reopen or reconsider is filed before the petition for review.

The District of Columbia Circuit and the Fifth Circuit apply a variation of the Eleventh and Ninth Circuit rule. In Attoh v. I.N.S., 606 F.2d 1273 (D.C.Cir. 1979), the court adopted the Ninth Circuit's rule set

forth in Bregman. However, the Fifth Circuit only adopted the Bregman approach "only insofar as it implicitly recognizes that intervening good faith petitions for administrative relief may toll or suspend the running of the time limit." Attoh at 1276. See also Pierre v. I.N.S., 932 F.2d 418 (5th Cir. 1991) (Fifth Circuit adopting Attoh, finding "[t]his approach best merges the traditional understanding of a 'final order' with the special concerns that arise in the context of deportation orders").

The above-mentioned Circuit Courts have determined a motion to reopen or reconsider is "timely" filed with the BIA when done so within the period set out in Section 106 (a) (1) for judicial review.[1]

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[1] The issue of what constitutes "timely" filing of a motion to reopen or reconsider has been clarified by an I.N.S. regulation taking effect on February 10, 1994. The regulation provides that such motions are to be filed within 30 days

The Third Circuit, Seventh Circuit and the Eighth Circuit in the instant case, in direct conflict with the Eleventh and Ninth Circuits, hold that a motion to reopen or reconsider a final deportation order has no effect on the time period for seeking judicial review. In Nocon v. I.N.S., 789 F.2d 1028, 1033 (3rd Cir. 1986), the court noted that "[c]ontrary to the position advanced by the Court of Appeals for the Ninth Circuit, we do not agree that a timely filing of a motion to reopen or reconsider suspends the six month time period for seeking judicial review of the original, final deportation order pending the outcome of that motion." The Third Circuit was concerned that aliens might use successive, piecemeal appeals as a "dilatory tactic to postpone the execution of deportation

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after the decision. 59 Fed.Reg. 1455 (January 11, 1994).

orders." Id. at 1033. See also Akrap v. I.N.S., 966 F.2d 267, 271 (7th Cir. 1992) (holding the timely filing of a motion to reopen or reconsider does not render nonfinal the order of deportation issued by the BIA).

Moreover, in the instant case the Eighth Circuit rejected the "good faith" test used by the Fifth and District of Columbia Circuits, reasoning "that it is well beyond the scope of our role under the Immigration and Nationality Act (INA) as described by Congress to determine whether an alien has filed a motion to reopen or reconsider in 'good faith' in order to decide if we have jurisdiction." (Decision at 4).

Thus, the Circuit Courts have developed three separate answers to the same question. Resolving the split on this issue is critical to both aliens and the INS. The different standards have led to extreme confusion regarding an alien's ability to seek his or

her constitutionally protected right to judicial review of a final order of deportation.

For example, aliens living in the Third, Seventh and Eighth Circuits may be denied judicial review despite filing timely motions to reopen and reconsider which would have entitled them to judicial review had they simply resided in the Eleventh or Ninth Circuits. In addition, an alien residing in the Fifth or District of Columbia Circuits will be precluded from seeking judicial review if the court finds, after the fact, that the motion to reopen or reconsider was not filed in good faith.

Just as importantly, the split in the Circuits has impeded the INS' ability to uniformly administer the INA. The split has required the INS to adopt different policies depending upon the judicial Circuit, which can lead to confusion, inefficiency and waste

of resources.

2. The Eighth Circuit failed to recognize that Congress intends for judicial efficiency and fairness concerns to outweigh the concern of aliens engaging in abusive appeals.

Not surprisingly the Circuits are also in disagreement regarding the Congressional intent on the issue herein.

For example, the Ninth Circuit reasons the tolling of the period within which to seek judicial review can be explained in terms of the Congressional purpose underlying Section 106. Hyun Joon Chung v. I.N.S., 720 F.2d 1471, 1474 (9th Cir. 1983). Congress was concerned with the widespread abuse of the process of judicial review of deportation orders. Id. Successive, piecemeal appeals had purportedly been used as a dilatory tactic to postpone the execution of deportation orders. Id. citing H.R. No. 1086, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2950,

2967. In response to this problem, "Congress visualized a single administrative proceeding in which all questions relating to an alien's deportability would be raised and resolved, followed by a single petition in a court of appeals for judicial review . . ." Id. citing Yamada v. I.N.S., 384 F.2d 214, 218 (9th Cir. 1967).

In contrast, the Third Circuit, in Nocon v. I.N.S., 789 F.2d 1028, 1033 (3rd Cir. 1986), cited the same passage of legislative history as the Hyun Joon Chung court as supporting the proposition that "filing of motions to reopen or to reconsider would directly contravene Congressional intent to prevent successive, piecemeal appeals . . ."

The Third Circuit's reasoning, however, fails to address Congressional concerns regarding the judicial, rather than the administrative, process.

Moreover, the petitioner asserts the

1990 adoption of Section 106 (a) (6) of the INA further supports the Ninth Circuit's analysis of the legislative history. Section 106 (a) (6) provides "Whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order."

Although there is no legislative history dealing specifically with § 106 (a) (6), Congress did provide, "unless the Attorney General finds reasonable evidence to the contrary, the regulations must specify that the administrative appeal of a deportation order must be consolidated with the appeal of all motions to reopen or reconsider in such deportation proceeding." H.R. Rep. No. 101-955, 101st Cong., 2d Sess. (1990), reprinted in 101 U.S. Code Cong. & Admin. News 6798. This language strongly suggests Congress is concerned with judicial efficiency over the

prospect of abusive appeals. See Fleary, supra at 713 (motion to reopen gives BIA the opportunity to correct its own alleged errors, and allowing it do so prevents unnecessary burdens being placed on the courts of appeal).

With respect to judicial efficiency concerns it is important to note that the Eleventh and Ninth Circuits, and the Fifth Circuit to a certain degree, have all ruled similarly on the issue. These Circuits arguably have the greatest immigration case load, and are therefore in the best position to gauge judicial efficiency concerns vis-a-vis abusive appeals tactics. Thus, great weight should be accorded to the decisions of these Circuits. Because these Circuits find judicial efficiency concerns paramount, this Court should place great emphasis on the respective decisions of those courts.

Fairness concerns also support following

the Eleventh and Ninth Circuit rule. With respect to motions to reopen or reconsider the potential for abuse by the INS must be noted. Pursuant to 8 C.F.R. 3.2, the departure of an alien from the United States during the pendency of a motion to reopen or reconsider constitutes withdrawal of the motion. Based on the regulation, the INS has incentive to "sit on" motions to reopen or reconsider until the court of appeals upholds the final order of deportation.

Following the rule proposed by the Eighth Circuit, once the alien is removed from the United States the motion to reopen or reconsider terminates and the alien is stripped of his right to administrative review. This would allow the INS to effectively emasculate the reopening and reconsideration provision. Such a result is clearly inconsistent with the INA and its regulations, especially in light of the

recent INS rule requiring motions to reopen or reconsider be filed within 30 days of the adverse decision.

3. The Eighth Circuit failed to properly analyze Supreme Court precedent directly on point

The Supreme Court has held that a petition to reopen or reconsider an action of the Interstate Commerce Commission, if filed within the time frame permitted for judicial review of the original order, "tolls the period for judicial review of the original order, which can therefore be appealed to the courts directly after the petition for reconsideration is denied." ICC v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, 279 (1987). In other words, a timely filed motion to reopen or reconsider [during the period allowed for judicial review unless otherwise specified] renders an otherwise final order nonfinal for purposes of review. Id. at 285.

Petitioner asserts that Locomotive Engineers is controlling of the instant case, especially when viewed in the context of the Immigration Act of 1990 and its accompanying regulations and legislative history.

In attempting to distinguish Locomotive Engineers the Eighth Circuit noted the INA regulations tend to support finality of the Board's deportation order regardless of a pending motion to reopen or reconsider. (Decision at 5). 8 C.F.R. § 3.8 provides, in relevant part:

> The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case.

See also 8 C.F.R. § 103.5 (a) (1) (iv) "Unless the Service directs otherwise, the filing of a motion to reopen or reconsider or

of a subsequent application or petition does not stay the execution of any decision in a case or extend a previously set departure date." The Eighth Circuit reasoned that adopting the rule of suspended finality renders these provisions "nonsense." (Decision at 9).

The Supreme Court, in direct contradiction to the Eighth Circuit's notions of "nonsense", noted that similar language is contained in the Interstate Commerce Act, the Hobbs Act and the Administrative Procedure Act. For example, Section 704 of the APA provides:

> Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section [entitled 'Actions Reviewable'] whether or not there has been presented or determined an application for . . . any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the actions meanwhile is inoperative, for an appeal to superior agency

authority.

Locomotive Eng'rs, 482 U.S. at 284, citing 5 U.S.C. § 704.

The language contained in the INA regulations is virtually indistinguishable from that contained in the Hobbs Act, ICA or APA.

The Supreme Court acknowledged its holding in Locomotive Engineers contradicted the language of the Hobbs Act and the ICA. Id. at 284. In explaining the contradiction, the Supreme Court noted previous interpretations of Section 704 and other similar statutes, stating "That language has long been construed by this and other courts merely to relieve parties from the requirement of petitioning for rehearing before seeking judicial review (unless, of course, specifically required to do so by statute . . .), but not to prevent petitions for reconsideration that are actually filed

from rendering the orders under reconsideration nonfinal." Locomotive Eng'rs, 482 U.S. at 284-85.

Under the regulations of the ICA a party must move to reopen or reconsider ICC decisions within twenty days. Locomotive Eng'rs, 482 U.S. at 279 n.2. The Attorney General recently implemented a similar time requirement (30 days) respecting motions to reopen or reconsider under the INA. As the language of the INA and its regulations is basically the same as that of the ICA or APA, the reasoning of the Supreme Court in Locomotive Engineers applies to the INA as well.

The Ninth Circuit, in Chu v. I.N.S., 875 F.2d 777 (9th Cir. 1989), has indeed applied the Locomotive Engineers reasoning to timely filed motions to reopen and reconsider final orders of deportation. The court noted "we find no principled basis upon which to

distinguish [the instant case] from Locomotive Engineers and its progeny." Id. at 781.

The Third Circuit, however, in Alleyne v. I.N.S., 879 F.2d 1177 (3rd Cir. 1989) refused to apply Locomotive Engineers to motions to reopen or reconsider final orders of deportation. The court noted that "[i]n the immigration context, Congress has determined that the potential for abusive appeals outweighs efficiency concerns." Id. at 1181.

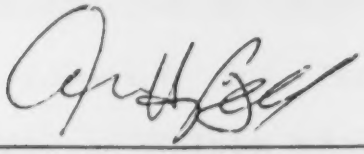
Because the Circuits are clearly split on the application of Locomotive Engineers to the INA, petitioner asserts Supreme Court guidance is necessary to resolve this issue.

4. Conclusion

In sum, the petitioner respectfully asserts that the INA and accompanying legislative history, as well as this Court's precedent support a finding that a timely

filed motion to reopen and reconsider a final order of deportation renders the order nonfinal for purposes of judicial review until the motion is denied, and as such the Court of Appeals for the Eighth Circuit erred in failing to dismiss the petitioner's Petition for Review as prematurely filed. Thus, the petitioner respectfully requests the Court to reverse the Eighth Circuit's decision dismissing his Petition for Review for lack of jurisdiction and to order the Eighth Circuit to enter its order dismissing his Petition for Review as prematurely filed with leave to refile within 90 days of the BIA's decision denying his motion to reopen and to reconsider (if necessary).

Respectfully submitted,
ALLAN H. BELL & ASSOCIATES



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ATTORNEYS FOR PETITIONER

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2949	)	
	)	
PUPI WHITE,	)	
	)	
Petitioner,	)	Petition for
	)	Review from
-versus-	)	the Board of
	)	Immigration
IMMIGRATION AND NATURALIZATION SERVICE,	)	Appeals
	)	
Respondent.	)	

Submitted: March 17, 1993

Filed: October 8, 1993

Before BOWMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

BOWMAN, Circuit Judge:

Pupi White petitions this Court for review of a deportation order issued by an immigration judge and affirmed by the Board

of Immigration Appeals (the Board). We conclude that White's petition for review as untimely filed, and that we therefore have no jurisdiction to review the order. Accordingly, we dismiss the petition.

White, a citizen of Western Samoa, entered the United States on a tourist visa in June 1979. Although the maximum period he was to have been permitted to stay in this country under the terms of the visa was three months, he never has left. In April 1984, he made a false statement on a passport application, claiming he was a United States citizen when he knew that he was not. When discovered, that action triggered deportation proceedings against White, for remaining in the United States longer than permitted and for failing to comply with the conditions of his nonimmigrant status. In January 195, he was convicted under 18 U.S.C. § 911 (1988) for "falsely and willfully represent[ing]

himself to be a citizen of the United States." He received a sentence of one year, suspended pending successful completion of one year of probation.

In March 1985, an immigration judge found White deportable and denied his request for voluntary departure.[1] White appealed to the Board, which, seven years later, on June 3, 1992, dismissed the appeal, agreeing that White was ineligible for voluntary departure. The Board upheld the immigration judge's conclusion that White's conviction under § 911 was for a crime involving moral

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[1] The Attorney General, charged with enforcing the immigration laws, 8 U.S.C. § 1103 (a) (1988), has discretionary authority to grant a deportable alien voluntary departure if the alien can demonstrate good moral character for the five years preceding application. Id. § 1254 (e) (Supp. IV 1992). Voluntary departure is desirable for the standpoint of the deportable alien as it facilitates reentry into this country. See, e.g., id. §§ 1182 (a) (6), 1326 (1988 & Supp. IV 1992).

turpitude, which precluded White from proving the good moral character required for voluntary departure under 8 U.S.C. §-1254 (e) (Supp. IV 1992). See 8 U.S.C. § 1101 (f) (3) (Supp. IV 1992). On July 6, 1992, White moved the Board to reopen and reconsider his case and for a stay of deportation. On September 2, 1992, his petition for review of the Board's decision was filed with this Court.

White argues that the Board abused its discretion in deciding that he was not entitled to voluntary departure. According to White, the Board based its decision on an erroneous interpretation of law in concluding that White's § 911 conviction was for a crime involving moral turpitude. The Immigration and Naturalization Service (INS), in its response, argues that the Board's decision was correct, but also challenges the jurisdiction of this Court to review the

Board's decision in the first instance, asserting that White's petition is time-barred. It is without dispute that White's petition for review was filed with this Court out of time, although White asks for equitable relief from the timeliness requirement. Before we consider the parties' arguments, however, we first must resolve a different jurisdictional issue raised by this Court sua sponte at oral argument.

I.

This Court has exclusive jurisdiction to review Board orders, but only when the petition for review is filed within ninety days of issuance of a "final deportation order." 8 U.S.C. § 1105a (a) (1) (Supp. IV 1992). As noted above, on July 6, 192, White filed with the Board a motion to reopen and reconsider. As of the date of the submission of this case (and the parties have not advised the Clerk of any change), the Board

has not ruled on that motion. Thus the question for us to decide is whether a pending motion to reopen or reconsider renders an otherwise final deportation order not final for purposes of review, thus depriving this Court of jurisdiction. The practical result of that conclusion would be to extend the time for filing a petition for review to ninety days beyond the Board's denial of the motion to reopen or reconsider, and to make premature any petition filed before the Board denies the motion.

This is a case of first impression in this Circuit. The issue has been addressed in other courts of appeals, but those circuits are split. Compare Fleary v. INS, 950 F.2d 711, 713 (11th Cir. 1992) (dismissing petition for review because it was filed when motion to reopen was pending, thus there was no final order to review when petition was filed, and petition was not

refiled within ninety days of denial of motion to reopen) and Chu v. INS, 875 F.2d 777, 779-80 (9th Cir. 1989) (holding that petition to reopen or reconsider filed with the Board renders deportation order nonfinal)[2] with Akrap v. INS, 966 F.2d 267, 271 (7th Cir. 1992) (holding that Board's deportation order was final notwithstanding pending motion to reopen) and Alleyne v. INS, 879 F.2d 1177, 1181 (3d Cir. 1989) (same); cf. Pierre v. INS, 932 F.2d 418, 421-22 (5th Cir. 1991) (per curiam) (allowing a "petition for rehearing" filed with the Board in "good faith" to toll the running of the time limit for judicial review); Attoh v. INS, 606 F.2d

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[2] In Berroteran-Melendez v. INS, 955 F.2d 1251, 1254 (9th Cir. 1992), however, the Ninth Circuit held that a motion to reopen or reconsider filed before a later filed but timely petition for review destroys finality of the Board's deportation order, but such a motion filed after the petition for review is lodged does not affect the finality of the order.

1273, 1275 n.15 (D.C.Cir. 1979) (per curiam) (same). Complicating the question is a case decided under the Interstate Commerce Act (ICA) by the Supreme Court, wherein the Court concluded that a petition to reopen or reconsider an action of the Interstate Commerce Commission (ICC), if filed within the time frame permitted for judicial review of the original order, "tolls the period for judicial review of the original order, which can therefore be appealed to the courts directly after the petition for reconsideration is denied." ICC v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, 279 (1987). We find the ICC case distinguishable for a number of reasons, and disagree with the reasoning of the Ninth and Eleventh Circuits. We also believe, contrary to the Fifth and District of Columbia Circuits, that it is well beyond the scope of our role under the Immigration and

Nationality Act (INA) as described by Congress to determine whether an alien has filed a motion to reopen or reconsider in "good faith" in order to decide if we have jurisdiction.

We must distinguish the Locomotive Engineers case because judicial review of both final orders of deportation and ICC final orders is governed, in general terms, by the Hobbs Act, 28 U.S.C. §§ 2341-51. See 8 U.S.C. § 1105a (a) (1988 & Supp. IV 1992); Locomotive Eng'rs, 482 U.S. at 277. In Locomotive Engineers, the Supreme Court construed the language found in the Hobbs Act, as well as the language from the Administrative Procedure Act (APA) and the ICA, to reach a conclusion--nonfinality of final orders when a motion to reconsider is pending--that appears to contradict the express language of the relevant statutes. See Locomotive Eng'rs, 482 U.S. at 284-85.

The Hobbs Act and the APA apply also to the review of orders under the INA. There are, however, features of the INA and its regulations, and the policy concerns behind them, that augur for a different result when a final deportation order is the reviewable action.[3]

The INA regulations are not definitive on the issue, but tend to support finality of the Board's deportation order regardless of a pending motion to reopen or reconsider. The regulations provide that, in general, Board decisions "shall be final except in those cases reviewed by the Attorney General" or in those cases that are returned to the INS or the immigration judge for further

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[3] The Immigration and Nationality Act controls when its provisions conflict with the Hobbs Act. See 8 U.S.C. § 1105a(a) (1988 & Supp. IV 1992).

proceedings. 8 C.F.R. § 3.1 (d) (2).[4] The regulations further state, more specifically, that "an order of deportation . . . shall become final upon dismissal of an appeal by the Board of Immigration Appeals." Id. § 243.1. Nowhere in the INA or its regulations is there any indication that a motion to reopen or reconsider, regardless of when it is filed or decided, has a bearing on the finality of a deportation order.

In immigration law, motions to reopen and reconsider are not authorized by statute, but by the Attorney General in regulations promulgated pursuant to the INA, and the granting of the motions is entirely discretionary with the Board. INS v. Doherty, 112 S.Ct. 719, 724 (1992). The motions are new claims in the administrative

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[4] All citations to the Code of Federal Regulations in this opinion are to the 1993 edition.

process that may be filed in "any case in which a decision has been made by the Board." 8 C.F.R. § 3.2. No such motion is required to exhaust administrative remedies. See 8 U.S.C. § 1105a (c) (1988) (declaring that no judicial review is possible until the alien has "exhausted the administrative remedies available to him as of right under the immigration laws and regulations"); Castillo-Villagra v. INS, 972 F.2d 1017, 1023 (9th Cir. 1992) (holding that reopening is discretionary remedy, not available "as of right" and so motion to reopen is not required to exhaust administrative remedies); Rhoa-Zamora v. INS, 971 F.2d 26, 31 (7th Cir. 1992) (same), cert. denied, 113 S.Ct. 1943 &2231 (1993). Contra Dokic v. INS, 899 F.2d 530, 532 (6th Cir. 1990) (per curiam). Motions to reopen or reconsider in the immigration context are not appeals to the Board from its own order, but are more

accurately described as collateral attacks on the Board' order. See 8 C.F.R. §§ 3.2, 3.8; cf. Locomotive Eng'rs, 482 U.S. at 279 n.2 (quoting the ICC regulation that designates a "discretionary appeal" to the ICC a "petition for administrative review," unless the appeal is from an action of the entire ICC, in which case it should be designated a "petition to reopen"). The grounds that may be alleged in support of a motion to reopen or reconsider a decision by the Board are quite rigid and are very different from those grounds appropriately set forth in a petition for review to the court of appeals, where review is limited to the administrative record and the findings of fact. 8 U.S.C. § 1105a (a) (4) 1988).

These motions are more analogous to motions for relief from judgment for mistake or for newly discovered evidence made pursuant to Federal Rule of Civil Procedure

60 (b) and Federal Rule of Criminal Procedure 33. See Doherty, 112 S.Ct. at 724 ("Motions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing, and motions for a new trial on the basis of new discovered evidence."); INS v. Abudu, 485 U.S. 94, 107 & n.12 (1988) (citing cases applying Federal Rule of Criminal Procedure 33). In a civil case tried in federal court, a party has a year from judgment within which to bring such a motion, but the motion "does not affect the finality of a judgment or suspend its operation." Fed.R.Civ.P. 60 (b). In the case of a criminal conviction, "[a] motion for a new trial based on the grounds of newly discovered evidence may be made only fore or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case." Fed.R.Crim.P. 33. By the same token, a

collateral habeas corpus attack on a criminal conviction, made after the direct appeals are completed, does not suspend finality of the conviction while the habeas action is pending.

The Hobbs Act gives the aggrieved party sixty days to petition for review, 28 U.S.C. § 2344 (1988), but Congress saw fit to extend that period to ninety days in the case of final orders of deportation, 8 U.S.C. § 1105a (a) (1). Under the INA regulations a motion to reopen or reconsider may be brought at any time before the alien departs, 8 C.F.R. § 3.2, compared with decision under the ICA, where a party must move to reopen or reconsider ICC decisions within twenty days, Locomotive Eng'rs, 482 U.S. at 279 n.2. If we were to adopt the rule of suspended finality we would leave the deportation process, already designed to give deportable aliens more time to challenge deportation

orders than is available to those challenging other administrative decisions, open to abuse by deportable aliens seeking to delay deportation.

An alien under a final deportation order could wait until just before the ninety-day appeal period expired and then file a motion to reopen or reconsider. The Board's denial of the motion would then be reviewable by this Court. Aiyadurai v. INS, 683 F.2d 1195, 1199 (8th Cir. 1982). If the deportation order were not final until the motion to reopen or reconsider were denied, and if the alien had not been deported by the time the motion were decided, he could appeal from the denial of that motion--and then file another motion to reopen because of the Board's new order denying the first motion. If we permit motions to reopen or reconsider to suspend finality of a deportation order, there apparently is nothing to keep an alien from

filing such motions ad infinitum, as the motions may be sought in any case in which the Board renders a decision--presumably including a decision denying a motion to reopen. See Butros v. INS, 990 F.2d 1142, 1152 (9th Cir. 1993) (en banc) (Trott, J. dissenting) (noting that alien could manipulate the system so as to delay finality of deportation order indefinitely); See also Rhoa-Zamora, 971 F.2d at 33. Because of this potential for abuse, we are not convinced, as apparently is the Ninth Circuit, see Berroteran-Melendez v. INS, 955 F.2d 1251, 1255 (9th Cir. 1992) (citing Chu, 875 F.2d at 779), that concerns of judicial efficiency compel staying judicial review pending decision on the motion to reopen or reconsider. Like the Third Circuit, we believe that, "[i]n the immigration context, Congress has determined that the potential for abusive appeals outweighs efficiency

concerns." Alleyne, 879 F.2d at 1181.

We find support for our conclusion in the fact that a petition for judicial review in most cases will stay deportation until review is completed. 8 U.S.C. § 1105a (a) (3) (Supp. IV 1992). A motion to reopen or reconsider, however, does not have the same effect:

> The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board of the officer of the Service having administrative jurisdiction over the case.

8 C.F.R. § 3.8 (a); see also id. § 103.5 (a) (1) (iv) ("Unless the Service directs otherwise, the filing of a motion to reopen or reconsider or of a subsequent application for petition does not stay the execution of any decision in a case or extend a previously set departure date."). Without the automatic

stay of deportation triggered by a timely petition for review (or the granting of a discretionary stay), the INA regulations make an alien immediately deportable in spite of his motion to reopen or reconsider and notwithstanding, we assume from the plain language of the regulations, any suspended finality (for review purposes) of the deportation order.

If the filing of a motion to reopen or reconsider within the ninety days permitted for filing a timely petition for review renders a deportation order nonfinal for all purposes, then either the deportation order would be a nullity and there would be nothing to execute (and sections 3.8 (a) and 103.5 (a) (1) (iv) would be nonsense), or the order would still be enforceable but the petition for review would be premature, the automatic stay would not be in effect, and the alien would be immediately deportable for as long

as the motion to reopen were pending. Courts advocating suspended finality have not chose between these two possibilities, but in our view neither is particularly satisfactory. Unlike the situations likely to arise under orders from other administrative agencies, nothing is more final under immigration law than deportation, as the alien has no recourse in the court of appeals or with the Board once he has left the country. 8 U.S.C. § 1105a (c) (stating that the court of appeals cannot review a final order of deportation if the alien has left the country); 8 C.F.R. § 3.2 (stating that a motion to reopen or reconsider shall not be made if the alien has left the country, and any such motion shall be considered withdrawn if the alien leaves the United States while the motion is pending). The automatic stay of execution of a final order of deportation that accompanies a petition for review,

considered by Congress important enough to be mandatory in immigration law, is corrupted by the scenario of suspended finality.

We note that the 1990 amendments to the INA added a provision that requires consolidation of a petition for judicial review of a decision of a motion to reopen or reconsider. 8 U.S.C. § 1105a (a) (6) (Supp. IV 1992). Although courts on both sides of the question of whether a motion to reopen or reconsider renders a final order of deportation nonfinal have seized upon 8 U.S.C. § 1105a (a) (6) and attributed to it various meanings, we believe this subsection to be irrelevant to the question. Compare Akrap 966 F.2d at 271 (concluding that § 1105a (a) (6) supports finality of deportation order regardless of pending motions) with Fleary, 950 F.2d at 713 (finding support in § 1105a (a) (6) for conclusion that pending motion suspends

finality). We conclude that § 1105a (a) (6) means only that if both reviews are pending at the same time they should be heard together. We do not think Congress intended by this simple provision to interfere with the goal of expediting deportation once the alien's status has been determined.

Congress intended the immigration laws to expedite deportation once an alien's deportability is established. Alleyne, 879 F.2d at 1180. "In administering this country's immigration laws, the Attorney General and the INS confront an onerous task even without the addition of judicially augmented incentives to take meritless appeals, engage in repeated violations, and undertake other conduct solely to drag out the deportation process." INS v. Rios-Pineda, 471 U.S. 444, 450-51 (1985). If we were to suspend action on petitions for review of final deportation orders merely

because motions to reopen or reconsider have been filed, we would encourage otherwise deportable aliens to filed unwarranted and meritless motions of this sort, and appeals from denial of those motions, in order to delay deportation. See Rhoa-Zamora, 971 F.2d at 33. Such a result is plainly at odds with the Congressional purpose, and would serve only to facilitate a deportable alien's efforts "to prolong litigation in order to delay physical deportation for as long as possible." Rios-Pineda, 471 U.S. at 450. "The purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability; it is not to permit an indefinite stalling of physical departure in hope of eventually satisfying legal prerequisites." Id.

We hold that a motion to reopen or reconsider pending before the Board of Immigration Appeals has no effect on the

finality, or the ripeness for judicial review, of a final order of deportation.[5] Thus, we have jurisdiction to consider a petition for review of a final order of deportation timely filed with this Court, regardless of any pending motion to reopen or reconsider.

II.

In part I of this opinion we have held that White's filing a motion to reopen or reconsider does not affect our present jurisdiction over his petition for review of the INS's final order of deportation. We turn now to the INS's contention that White's

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[5] Our holding has no effect on this Court's discretion to hold in abeyance a petition for review of a final deportation order pending the Board's decision on a motion to reopen or reconsider. See Lozada v. INS, 857 F.2d 10, 12 (1st Cir. 1988) (accepting jurisdiction over petition notwithstanding later-filed motion to reopen, but holding case in abeyance pending Board's decision on motion).

petition was not timely filed, and that we lack jurisdiction for that reason. It is undisputed that White mailed his petition by registered mail from Kansas City, Missouri, on Friday August 28, 1992. To be timely filed, it was due in the office of the Clerk of this Court in St. Louis, Missouri, no later than September 1, 1992, but it was not received until September 2, 1992. White acknowledges that the petition was filed out of time but contends that it was constructively filed because the United States Postal Service took five days to deliver it. White asserts that this Court therefore has "equitable jurisdiction," Petitioner's Reply Brief at 8, notwithstanding that he had eighty-five days before August 28 within which to timely file the petition.

This is not a situation in which we have discretion to waive the filing requirement.

The timeliness requirement set forth in the INA is "mandatory and jurisdictional." Lee v. INS, 685 F.2d 343 (9th Cir. 1982) (per curiam). We are further constrained by Federal Rule of Appellate Procedure 26 (b), which states that we may not "enlarge the time prescribed by law for filing a petition to . . . review . . . an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law."

The cases White cites in support of his argument for equitable relief from the time limit were decided under Federal Rule of Appellate Procedure 4 (a), which concerns the notice of appeal required to be filed with the district court in order to appeal from the judgment in a civil action. But because a petition for review of a deportation order is a direct appeal to the court from an administrative decision, the rule that

applies to filing the petition is Federal Rule of Appellate Procedure 25 (a) (emphasis added):

> Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk, within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special deliver, is utilized.

The specific timeliness language in Rule 25 (a), absent from Rule 4 (a) causes us to question the applicability of Rule 4 (a) cases here. Moreover, even if we thought we were empowered under our rules and the INA to grant equitable relief of the kind White seeks, he would not be entitled to such relief under the facts here. White was fast approaching the filing deadline when he finally mailed his petition. He could have chosen a more efficient method instead of

selecting one (registered mail) that could actually slow down delivery. In these circumstances, we are unable to accept White's argument that the post office is responsible for the untimely filing of his petition. We hold that White's petition for review is time-barred.

We are not without sympathy for White, who appears to have established himself as a valuable member of the community, and his family. But we also must record our dismay about the amount of time he has been permitted to remain in the United States illegally. Had he been deported when he first overstayed his visa, he might already have returned to the country legally and would not now have to be separated from his family and the home he has known here for some fourteen years. That a case like this one could occur suggests that a Congressional review of the immigration laws and their

administration is very much in order.

White's petition for review, having been untimely filed, is dismissed for lack of jurisdiction.

Decision of the Board of Immigration Appeals

Files: A26 635 277 - Kansas City Date:
A26 635 281 June 3, 1992
A26 635 282
A26 635 283

In re: PUPI WHITE MASAUTELE WHITE
HELLEN TOESE WHITE HENRY WHITE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:

Allan H. Bell, Esquire
2022 Swift, Suite 202
N. Kansas City, MO 64116-3442

ON BEHALF OF SERVICE: Paula V. Davis
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. Section 1251(a)(2)] - Nonimmigrant - remained longer than permitted (all respondents)
Sec. 241(a)(9), I&N Act [8 U.S.C. Section 1251(a)(9)] - Failure to comply with conditions of status (adult male respondent)

APPLICATION: Voluntary departure

In a decision dated March 19, 1985, an immigration judge found the adult male respondent (A26 635 277) deportable under

Sections 241(a)(2) and (9) of the Immigration and Nationality Act, 8 U.S.C. Sections 1251(a)(2) and (9), denied him voluntary departure in the exercise of discretion, and ordered him deported to Western Samoa. In the same decision, the remaining respondents were found deportable under Section 241 (a)(2) of the Act, granted voluntary departure, and alternatively ordered deported to Western Samoa. The respondents appealed. This appeal with respect to the adult male respondent will be dismissed and the deportation proceedings with regard to the remaining respondents (A26 635 281/282/283) will be terminated.[1] The request for oral

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[1] On May 27, 1992, counsel for the Immigration and naturalization Service informed this Board that the adult male respondent's wife (A26 635 281) and two children (A26 635 282/283) were adjusted to lawful permanent resident status on May 8, 1989. The appeals of these three respondent's, therefore, are moot. Hence, the remainder of this decision will be devoted to the

argument before this Board is denied. 8 C.F.R. Section 3.1(e) (1992).

To begin with, we do not believe the adult male respondent (the "respondent") was denied a fair hearing before an impartial judge. The fact that the immigration judge asked questions of the respondent does not establish that he overstepped his duties as an immigration judge or that he was hostile to the respondent or his attorney. Immigration judges have broad discretion concerning the conduct of deportation hearings and may question respondents to facilitate the hearing and ascertain the relevant facts. See 8 C.F.R. Sections 3.10, 242.8 (1992). We have received the record in its entirety and do not find sufficient support for the

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contentions raised by the adult male respondent (A26 635 277) with respect to his case only.

respondent' claim of bias by the immigration judge to warrant the conclusion that the immigration judge's conduct deprived him of a constitutionally fair proceeding. See Matter of Exame, 18 I&N Dec. 303 (BIA 1982).

Moreover, even it we were inclined to conclude otherwise, the respondent has now shown that he was prejudiced as a result of the immigration judge's reported mishandling of his case. See Matter of Santos, 19 I&N Dec. 105 (BIA 1984); Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980). The respondent has not raised any challenges to the immigration judge's findings of deportability. And, while the respondent believed the immigration judge erred in denying him voluntary departure, it is clear from the record that he was statutorily ineligible at the time for that form of relief. To this end, we note that in 1985 the respondent here was convicted for

wilfully and knowingly representing himself to be a United States Citizen on a Department of State Application for United States Passport (Exh. 2A).[2] Such a crime involving fraud and the making of false statements is a crime involving moral turpitude. See Matter of Correa-Garces, Interim Decision 3169 (BIA 1992). As such, when the immigration judge rendered his decision in 1985, the respondent, having been recently convicted of that crime, was precluded by operation of Section 101(f)(3) of the Act, 8 U.S.C. Section 1101(f)(3), from establishing the requisite 5 years of good moral character with which to statutorily qualify for relief under Section 244(e) of the Act, 8 U.S.C. Section 1254(e). Voluntary departure, therefore, was properly denied and no

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[2] The respondent received a 1-year prison term with the execution of that sentence suspended, and he was placed on probation for 1 year (Exh. 2A).

prejudice has been shown.

The respondent's final challenge concerns this appeal itself. He asks that this appeal be held in abeyance pending determination of his application for adjustment of status under Section 210 of the Act, 8 U.S.C. Section 1160 (SAW provisions). Without ruling on the merits of such an application, which is clearly beyond the scope of this appeal, it appears the respondent, having been convicted of a crime involving moral turpitude, does not qualify for adjustment under Section 210 of the Act. See Sections 210(c)(2) and 212 (a)(9) of the Act, 8 U.S.C. Sections 1160(C)(2) and 1182(a)(9); Matter of Castro, 19 I&N Dec. 692 (BIA 1988). Therefore, we decline to hold this appeal in abeyance pending the

disposition of that application.[3] Accordingly, the following orders will be entered.

ORDER: As to the adult male respondent (A26 635 277), this appeal is dismissed.

FURTHER ORDER: As to the remaining three respondents (A26 635 281/282/283), deportation proceedings are terminated and their records of proceedings shall be

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[3] In support of his claim that he is eligible for adjustment as a seasonal agricultural worker, the respondent has come forward with evidence indicating that he has successfully completed his parole and that he is presently seeking a presidential pardon for his 1985 conviction. He also has produced a letter from the federal judge who presided over his criminal case asking that the respondent's conviction be given minimal effect in these immigration proceedings. Whatever the merits of the respondent's post-conviction relief may be, the respondent's conviction remains a valid conviction for these purposes. See Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir. 1977), cert. denied, 434 U.S. 853 (1978).

returned to the Office of the Immigration Judge with further action.

FOR THE BOARD

United States of America
U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of:
In Deportation Proceedings Under
Section 242 of the Immigration and
Nationality Act

Pupi White	File No.: A26 635 277
Masautele White	A26 635 281
Hellen White	A26 635 282
Henry White	A26 635 283

Respondents.

ON BEHALF OF THE RESPONDENT:

ALLAN H. BELL, ESQUIRE

IN BEHALF OF THE IMMIGRATION
AND NATURALIZATION SERVICE:

BERNARD W. BRAUN, ESQUIRE

ORDER

____ Oral decision entered _____ denying respondent's application for suspension of deportation.

____ Oral decision entered _____ denying the respondent's application for political asylum and withholding of deportation.

____ Oral decision entered _____ denying the respondent's application for a waiver under Section_____ of the I&N Act.

_X_ Oral decision ordering respondent, Pupi White, deported entered Western Samoa.

_X_ Oral decision entered granting voluntary if respondents Masautele White, Hellen White and Henry White depart by June 19, 1985, thereafter order of deportation entered designating Western Samoa.

____ Appeal reserved by _X_ respondent ____ INS.

____ Appeal time expired March 29, 1985 No appeal filed.

____ Decision final.

_____

O. John Brahos

Immigration Judge

Entered: March 19, 1985

_____

Place

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2949	)	
	)	
PUPI WHITE,	)	
	)	
Petitioner,	)	Petition for
	)	Review from
-versus-	)	the Board of
	)	Immigration
IMMIGRATION AND NATURALIZATION SERVICE,	)	Appeals
	)	
Respondent.	)	

The petition for rehearing by the panel is denied.

December 9, 1993

Order entered at the Direction of the Court

/s Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

STATUTES, REGULATIONS AND RULES

STATUTES

5 U.S.C. § 704. Actions reviewable.

Except as otherwise expressly required by statute, agency action otherwise final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the section meanwhile is inoperative, for an appeal to superior agency authority.

8 U.S.C. § 1105a. Judicial review of orders of deportation and exclusion [INA § 106]

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of Title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review

of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that--

(1) Time for filing petition

a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 30 days after the issuance of such order;

8 U.S.C. § 1105a (a) (6), Section 106 (a) (6) of the Immigration and Nationality Act, as amended

(6) Consolidation

whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be

consolidated with review of the order

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions.

Cases in the courts of appeals may be received by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

REGULATIONS

8 C.F.R. § 3.2 Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be

only upon written notice to the Board. Motions to reopen deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to this departure from the United States. Any departure from the United States

of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. For the purpose of this section, any final decision made by the Commissioner prior to the effective date of the Act with respect to any case within classes of cases enumerated in § 3.1 (b)(1), (2), (3), (4) or (5) shall be regarded as a decision of the Board.

8 C.F.R. § 3.8 Motion to reopen or motion to reconsider.

(a) Form. Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits

or other evidentiary material. Motion to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent. In any case in which a deportation order is in effect, there shall be included in the motion to reopen or reconsider such order a statement by or on behalf of the moving party declaring whether the subject of the deportation order is also the subject of any pending criminal proceeding under section 242(e) of the Act, and, if so, the current status of that proceeding. If the motion to reopen or reconsider is for the purpose of seeking discretionary relief, there shall be included in the motion a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. Motions

to reopen or reconsider shall state whether the validity of the deportation order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its results or status. The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case.

8 C.F.R. § 103.5 Reopening or reconsideration.

(a) Motions to reopen or reconsider in other than special agricultural worker and legalization cases.--(1) When filed by affected party.--

(iv) Effect of motion or subsequent application or petition. Unless the Service directs otherwise, the filing of a motion to reopen or reconsider or of a subsequent application for petition does not stay the execution of any decision in a case or extend a previously set departure date.

RULES

Fed.R.App.P. 40. Petition for Rehearing.

(a) Time for filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the

petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.

Supreme Court Rule 13. Review on Certiorari; Time for Petitioning.

.1. A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, a United States court of appeals, or the United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within 90 days after

the entry of judgment. A petition for writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed with the Clerk within 90 days after the entry of the order denying discretionary review.

.4. The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing) runs from the date of the denial of the petition for rehearing

or the entry of a subsequent judgment. A rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within meaning of this rule.

Supreme Court, U.S.
FILED
MAY 16 1994
OFFICE OF THE CLERK

No. 93-1411

In the Supreme Court of the United States

OCTOBER TERM, 1993

PUPI WHITE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

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Assistant Attorney General

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9pp

QUESTION PRESENTED

Whether the court of appeals correctly dismissed a petition for review of a final order of deportation issued by the Board of Immigration Appeals, in a case in which the petition was filed more than 90 days after the Board's order and while a motion to reopen or reconsider that order was pending before the Board.

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8 U.S.C. 1105a(a)(1) (Supp. IV 1992)	4
8 U.S.C. 1252b note (Supp. IV 1992)	4
8 U.S.C. 1254(e)	2
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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1411

PUPI WHITE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-60) is reported at 6 F.3d 1312. The decision of the Board of Immigration Appeals (Pet. App. 61-68) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1993. A petition for rehearing was denied on December 9, 1993. Pet. App. 71. The petition for a writ of certiorari was filed on March 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of Western Samoa who entered the United States in 1979 on a three-month tourist visa. In 1985, he was convicted under 18 U.S.C. 911 of falsely stating on a passport application that he was a United States citizen. See Pet. App. 33-34, 64-65.

2. The government instituted deportation proceedings based on petitioner's failure to comply with the terms of his visa. In March 1985, the immigration judge found petitioner deportable and denied his request for voluntary departure under 8 U.S.C. 1254(e). See Pet. App. 34.

3. The Board of Immigration Appeals dismissed petitioner's appeal on June 3, 1992. Pet. App. 61-68. The Board rejected petitioner's claim that the immigration judge was biased, which rested on the demeanor of the immigration judge at petitioner's deportation hearing. *Id.* at 63-64. The Board also concluded that petitioner was statutorily ineligible for voluntary departure, because his 1985 conviction prevented him from establishing the good moral character that is a requisite for voluntary departure. *Id.* at 64-65 (citing 8 U.S.C. 1101(f)(3), 1254(e)).

On July 6, 1992, petitioner filed a motion requesting that the Board reopen and reconsider its decision. On September 2, 1992 (91 days after the Board's decision), petitioner filed a petition for review in the court of appeals. See Pet. App. 35.

4. The court of appeals dismissed the petition for review. Pet. App. 32-60.

a. The court of appeals at oral argument raised the question whether petitioner's filing of a motion to

reopen or reconsider rendered the decision of the Board nonfinal, and thus tolled the time for filing a petition for review of that decision. The court of appeals analyzed that question in detail, noting the differing views of the various courts of appeals on the question, and concluded that petitioner's filing of a motion to reopen or reconsider did not affect the finality of the Board's decision. Pet. App. 36-55.

b. Having determined that the period for filing a petition for review commenced with the issuance of the Board's June 3, 1992, order, the court then considered whether petitioner's September 2, 1992, petition for review was timely. Pet. App. 55-60. Because the petition for review was filed 91 days after the Board's order, the court held that it was untimely, explaining that "[t]his is not a situation in which we have discretion to waive the filing requirement. The timeliness requirement set forth in [8 U.S.C. 1105a (Supp. IV 1992)] is mandatory and jurisdictional." Pet. App. 56-57 (internal quotation marks omitted). The court also noted that Fed. R. App. P. 26(b) states that the court may not "enlarge the time prescribed by law for filing a petition to * * * review * * * an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law." Accordingly, the court dismissed the petition for review for lack of jurisdiction. Pet. App. 57-60.

ARGUMENT

Petitioner does not challenge the court of appeals' conclusion that it could not accept a petition for review filed outside the 90-day filing period prescribed

by 8 U.S.C. 1105a(a)(1) (Supp. IV 1992).[1] Rather, petitioner's sole argument (Pet. 12-31) is that the court of appeals erred in concluding that the time for filing a petition for review was not tolled by his filing of a motion to reopen or reconsider the Board's order. As we have explained in our brief responding to the petition in *Stone* v. *INS*, No. 93-1199 (a copy of which we have provided to counsel for petitioner), that is an important question, on which the courts of appeals are divided. Petitioner fails, however, to indicate how resolution of that question in accordance with petitioner's views would affect the court of appeals' disposition of this case.

If, as petitioner argues, his filing of a motion to reopen or reconsider the Board's order deprived that order of finality, then the motion also deprived petitioner of the ability to seek review of the order, because the jurisdiction of the court of appeals under 8 U.S.C. 1105a(a) (1988 & Supp. IV 1992) is limited to "final orders of deportation." Accordingly, courts that have accepted petitioner's view of the finality question regularly have dismissed petitions for review that—like this one—were filed while a timely motion to reopen or reconsider was pending before the Board. See, *e.g.*, *Ogio* v. *INS*, 2 F.3d 959, 960 (9th Cir.

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[1] The 90-day period prescribed by 8 U.S.C. 1105a(a)(1) (Supp. IV 1992) applies to this case, rather than the six-month period available under prior law, see 8 U.S.C. 1105a(a)(1) (1988). The period was shortened by Section 545(b) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5065, and applies to final orders of deportation entered on or after January 1, 1991. 1990 Act § 545(g)(4), 104 Stat. 5067. Section 545(g) of the 1990 Act is set out as a note following 8 U.S.C. 1252b (Supp. IV 1992).

1993); *Chu* v. *INS*, 875 F.2d 777, 779-780 (9th Cir. 1989); *Fayazi-Azad* v. *INS*, 792 F.2d 873, 874 (9th Cir. 1986). Petitioner offers no reason for supposing that his case would be disposed of any differently.

In sum, however the question at issue in *Stone* is resolved, petitioner's petition for review would not fall within the jurisdiction conferred by 8 U.S.C. 1105a(a) (Supp. IV 1992). If a motion to reopen or reconsider does not affect the finality of a final order of deportation, the petition for review was untimely because it was filed more than 90 days after the final order of deporation was issued by the Board. If a motion to reopen or reconsider deprives a final order of deportation of finality for purposes of 8 U.S.C. 1105a(a) (1988 & Supp. IV 1992), then petitioner's petition for review was premature because no final order has yet been issued.[2]

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[2] It may be that the decision in *Stone* would have an effect on the disposition of a timely petition for review filed after the Board decides petitioner's motion to reopen or reconsider, because a decision in *Stone* indicating that petitioner's petition here should have been dismissed as premature would suggest that petitioner could challenge the underlying order in any subsequent, timely filed petition. But the possibility that *Stone* might have an effect on future litigation involving petitioner is not a reason to hold the petition in this case until the Court disposes of *Stone*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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